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The Radical Nature of the Reagan Administration's Assault on Affirmative Action

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The following article is derived from testimony Professor Bartholet presented at oversight hearings on affirmative action held July 11, 1985, by the Subcommittee on Civil and Constitutional Rights of the United States House of Representatives Committee on the Judiciary, and the Subcommittee on Employment Opportunities of the House Committee on Education and Labor.

INTRODUCTION

The assault by some officials in this Administration on affirmative action in the employment area¹ represents a startling notion as to the appropriate use of this government's civil rights enforcement resources. Whatever the right and wrongs of the Administration's position on affirmative action, it is a shock to see the Civil Rights Division of the Justice Department, officials of the Civil Rights Commission and the Equal Employment Opportunity Commission (E.E.O.C.), devoting their primary efforts to protecting white males from discrimination. It is a similar shock to hear, as I heard recently from a lawyer opposing the Justice Department in one of the post-*Stotts* cases, that the Department in that case had been devoting its energies to proving, on a case by case basis, that individual black employees who were the beneficiaries of a court-ordered remedy, were less qualified to perform their jobs than individual white employees.

The Administration's assault is also radical in principle. It is based on the concept that race-conscious, group-oriented action, designed to provide minorities with jobs or other concrete benefits,² is morally, legally and constitutionally wrong because it would constitute unlawful discrimination against whites. Minorities can be provided benefits only if they can demonstrate that as individuals they are vic-

1. I focus on the employment area because that is where the Administration's efforts have thus far been concentrated, however it is clear that the implications of this assault, if successful, would be far-ranging. Indeed the Justice Department has already indicated that it considers affirmative action remedies improper in the areas of housing and school discrimination.

2. The only kind of affirmative action such a principle would allow is a limited kind of outreach—recruitment efforts directed toward black job candidates, for example.

tims of prior unlawful discrimination; the benefits then can be justified as relief for such discrimination. The underlying notion is that laws and constitutional provisions barring discrimination, such as Title VII of the 1964 Civil Rights Act and the Fourteenth Amendment to the United States Constitution, must be read in an entirely race-neutral way.³

I call this radical because it flies in the face of the reality that Title VII and the Fourteenth Amendment were passed primarily in order to deal with problems of discrimination against victimized minorities, and *not* to deal either with random arbitrary discrimination, or with problems of invidious discrimination against white males. And while race-conscious, group-oriented action has always been controversial, the principle that such action can and on occasion must be taken in order to deal with this nation's race problem has received increasing acceptance over the past two decades.

The assault, if successful, would also be radical in effect. As discussed at pp. 39-40 below, it would destroy the affirmative action programs that have become a major part of our society's efforts to integrate the workplace. Moreover and even more fundamental, as discussed at pp. 40-44 below, a successful assault would almost inevitably lead to the demise of the disparate impact doctrine—the doctrine endorsed in Chief Justice Burger's historic opinion for the Supreme Court in *Griggs v. Duke Power Co.* *Griggs* held unlawful, employer use of practices that had an adverse impact on minorities which could not be justified by business necessity. Elimination of the *Griggs* doctrine would drastically narrow the range of conduct traditionally condemned as discriminatory under Title VII.

Thus, if this Administration is successful, we would be left with a Title VII that had been gutted of much real meaning in today's world. Title VII would ban intentional discrimination, but intentional discrimination in provable form is hardly the major problem that blacks face in today's workworld. Proven victims of such discrimination would be able to obtain relief, but such victims will be few in number, and the relative handful of jobs and promotions that they might obtain in the name of relief will do little to affect patterns of segregation in the workplace.

It is important to realize that the Administration's assault has *already* undoubtedly had a significant effect on the attitudes of public and private employers, and on others in a position either to promote or to inhibit minority advancement in the workplace. Unless they are checked now, the Administration's efforts—whether ultimately successful or not in terms of rewriting laws, regulations and constitutional history—threaten significant damage to the progress that has been made in the workplace during the last several decades. Employers and others have gradually been brought to the point where they have developed significant programs promoting integration in the workplace. This progress is the result of years of efforts to educate them as to the meaning of the anti-discrimination principle, and to reward them for the development of affirmative action programs. Administration's claims that all race-conscious employer conduct designed to benefit minorities must be seen as unlawful discrimination, puts employers in an intolerable position. All that they have learned to date tells them that the legally safe and the morally right course is that which would promote the advancement of minorities in the workplace. Yet the federal government now states that such action constitutes unlawful discrimination against whites, subjecting employers to the risk of suit by the government and by their white employees. The current situation provides employers

3. The Justice Department's *amicus curiae* brief submitted recently in the *Wygant* case sets forth this position in some detail with respect to the federal constitutionality of affirmative action. See Brief for the United States as *Amicus Curiae* in *Wygant v. Jackson Board of Educ.*, U.S. Sup. Ct. Oct. Term, 1984, No 84-1340. The Chairman of the E.E.O.C. has recently indicated that in his view Title VII similarly prohibits all affirmative action.

with a very strong incentive to bring to a grinding halt all moves to develop affirmative action programs and, indeed, an incentive to dismantle such programs that exist.

AFFIRMATIVE ACTION PROGRAMS

Affirmative action programs, using numerical quotas and/or goals in order to promote racial integration of the workforce, have long been seen as key to accomplishing real change. Thus one of the first major federal initiatives in the employment discrimination area was Executive Order 11246,⁴ issued by President Johnson in 1965 and still in force as amended. This order, requiring government contractors to develop affirmative action programs, has proven one of the most effective devices in promoting integration of the workplace.⁵ Similarly, courts faced with egregious patterns of racial exclusion from the workforce have turned to affirmative action remedies as the most effective means for moving toward an integrated workforce. And public and private employers, together with unions, who have determined to do something to promote minority advancement in the workplace, whether to avoid legal liability or for other reasons, have turned increasingly to affirmative action programs. Again, while the evidence is difficult to unravel, careful students of the changes that have taken place for blacks in the workplace over the last couple of decades, believe that the affirmative action pressures created by the potential for Title VII liability, together with E.O. 11246, have been largely responsible for the substantial progress that has occurred.⁶

Affirmative action programs have been endorsed by the courts as lawful and constitutional, so long as they satisfied a basic rule of reason—so long as they did not unduly trammel the rights of whites, and so long as the programs were responsibly designed by an appropriate body.⁷ Thus far at least, the Supreme Court has only balked at affirmative action in the employment area where it would affect the vested seniority rights of white workers.⁸

All affirmative action programs are, of course, now subject to attack by those leading the Administration's assault. The assault in *principle* would be opposed to all, since all provide for race-conscious, group-oriented job preferences. All can be characterized, in the Administration's vocabulary, as reverse discrimination—discrimination against whites. The Justice Department has thus far focused its en-

4. Exec. Order No. 11246, 3 C.F.R. 339 (1964-64 comp.), reprinted in 42 U.S.C. 2000e (1982).

5. Thus serious analysts of the causes of such progress as blacks have made in the workplace in the past two decades, have given E.O. 11246 primary credit. See, e.g., Freeman, *Affirmative Action: Good, Bad or Irrelevant?: New Perspectives* U.S. Commission on Civil Rights, Fall 1984, 23, 25; Leonard, *Splitting Blacks?: Affirmative Action and Earnings Inequality Within and Across Races*, Working Paper No. 1327, National Bureau of Economic Research, Apr. 1984; Leonard, *The Impact of Affirmative Action* Berkley: School of Business Administration, University of California, 1983; Office of Federal Contract Compliance, *Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980*, Washington, D.C.: U.S. Department of Labor, June 1984. Oster and Juba *Assessing the Need for Affirmative Action: Race and Sex Inequality among Federal Contractors*, Policy Analysis, Inc., January 1984; Smith and Welch, *Affirmative Action and Labor Markets*, 2 J. LABOR ECON. 269, 280-83 (1984); Fallon and Weiler, *Fire Fighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1 at 11-12, n.47.

6. See Blumrosen, *Expanding the Concept of Affirmative Action to Address Contemporary Conditions*, 13 N.Y.U. REV. OF LAW AND SOCIAL CHANGE, 297, 297-300 (1984-85); Fallon and Weiler, *supra* n.5, at 52-53 and at 11-12, n.47.

7. See, e.g., Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193 (1979); Regents of the University of California v. Bakke, 438 U.S. 265 (1978); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971).

8. See Firefighters Local Union No. 1784 v. Stotts, No. 82-206, U.S.—, 104 S. Ct. 2575 (June 12, 1984). In Stotts four members of the court appear to indicate in dictum some doubt as to whether any court-ordered affirmative action remedies are legitimate under Title VII.

ergies on attacking public employer affirmative action programs,⁹ and in attacking court-ordered affirmative action remedies.¹⁰ And the Justice Department seems to recognize that for now the Supreme Court's decision in *Fullilove* and *Weber* requires that Congress and private employers be allowed to engage in some form of affirmative action. But the Department argues for an absurdly narrow interpretation of these cases, contending in its recent brief, in the *Wygant* case, pending in the Supreme Court, that *Fullilove* stands for a principle that goes not far beyond the notion that identified victims of discrimination can receive remedies for harms that they have suffered.¹¹ Moreover it is clear that other key programs, such as those promoted by E.O. 11246, and governmental regulations mandating or encouraging affirmative action, are up for grabs in this Administration.¹²

DISPARATE IMPACT DOCTRINE

As discussed above, the assault on affirmative action is designed to eliminate all programs that go beyond providing remedies for identified victims of discrimination. But this assault, if successful, would not stop at simply eliminating such programs. It would inevitably radically change the definition of discrimination that Congress and the courts have developed under Title VII. It would narrow that definition in a way that would limit drastically the number of victims that could ever be demonstrated to have suffered discrimination so as to be entitled to remedies. And it would narrow the definition in a way that would permit employers to use selection and promotion procedures that would screen minorities out of the workplace. In short, it would eliminate or drastically limit the disparate impact or *Griggs* doctrine that has been key to the effectiveness of Title VII.

Courts and commentators realized early in Title VII's history that disparate impact doctrine was essential if Title VII was to have any significant effect on the problems of segregation in the workplace that had inspired its passage. They realized that once the most blatant overt discriminatory barriers had been removed, it was "neutral" employer practices such as the use of educational degrees and testing requirements that posed the major barriers to black advancement in employment. Thus, they developed the concept that discrimination should be interpreted to cover the use of such neutral practices when they had an adverse impact on blacks that could not be justified on the grounds of "business necessity" or "job relatedness."¹³

Disparate impact doctrine was hardly revolutionary in concept. It was known that many of the tests and other selection devices commonly used by employers were of limited utility in selecting the most meritorious employees. It was also known that blacks, by virtue of educational and other discrimination would perform worse than whites on testing and educational degree requirements. It took no

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9. See, e.g., Brief for the United States as *Amicus Curiae* in *Wygant v. Jackson Board of Education*, U.S. Sup. Ct. Oct. Term 1984, No. 83-1340.
 10. The Justice Department has undertaken a review of all public employer cases in which it was involved, to seek modification of all litigated and all consent decrees to ensure that relief was provided only to proven victims of prior unlawful discrimination. For an example of the Department's position see, e.g., United States' Memorandum of Points and Authorities in *Hammon v. Barry etc.*, civil action nos. 84-0903, 85-0782, 85-0797 (D.D.C.) pp. 12-13, 30-42.
 11. See, e.g., Brief for the United States as *Amicus Curiae* in *Wygant*, *supra* n. 9, at 30 and related footnote; see also United States, Memorandum *supra* n. 10, at 25-30, arguing for a narrow interpretation of *Weber*.
 12. Thus the Chairman of the E.E.O.C. has made clear his hostility to federal agency efforts and regulations designed to encourage affirmative action, on the basis of the general principle that such efforts constitute anti-white discrimination.
 13. See generally Cooper and Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

great conceptual leap to decide that employer insistence on using such devices with their predictable adverse impact on blacks, constituted a *prima facie* case of unlawful discrimination. It seemed no great invasion of employer prerogatives to insist that employers either use selection devices that avoided adverse impact, or that they demonstrate the job-relatedness of any devices that produced an adverse impact on blacks. And so the disparate impact doctrine was developed by the lower federal courts relatively soon after the passage of Title VII,¹⁴ endorsed by the Supreme Court in 1971 in *Griggs v. Duke Power Co.*,¹⁵ and ratified by Congress as is reflected in the legislative history of the 1972 Amendments to Title VII.¹⁶

Disparate impact doctrine has, as predicted, proven key to the effectiveness of Title VII. Literally masses of employer practices that had functioned as barriers to black advancement in the workplace have been struck down as unlawful by the courts.¹⁷ Moreover this litigation helped to demonstrate that there was in fact no legitimate business justification for many common employer practices. Employers lost most of these cases *not* because they were subjected to an impossible burden of proof under the *Griggs* doctrine, but because, once courts looked at the evidence, they had to see that there was not enough that could be said in defense of these systems to justify their racially exclusionary effect.¹⁸

Disparate impact doctrine is especially important today. In the first place, employers are simply not likely to engage in intentional discrimination, in any provable form,¹⁹ twenty years after the passage of an Act that forbids such discrimination, and that provides for back pay and attorneys' fees. More important, most of the

14. See cases cited in Cooper and Sobel, *supra* n. 13.

15. 401 U.S. 424 (1971).

16. Thus the House Committee on Education and Labor Report in connection with the 1972 amendment to Title VII states:

Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problems in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, testing and validation requirements. The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the U.S. Supreme Court in its decision in *Griggs v. Duke Power Co.*, —U.S.—, 91 S. Ct. 849, 3 FEP Cases 175 (S. Ct. 1971), where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when non-discriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding business necessity for the use of such criteria.

H.R. Rep. No. 92-238, 92nd Cong. 1st Sess. at 8 (1971).

The Senate Report included similar language. S. Rep. No. 92-415, 92nd Cong., 1st Sess. at 5 (1971). In addition it provided that:

Civil Service selection and promotion techniques and requirements are replete with artificial requirements that place a premium on 'paper' credentials. Similar requirements in the private sectors of business have often proven of questionable values in predicting job performance and have often resulted in perpetuating existing patterns of discrimination (*see e.g.*, *Griggs v. Duke Power Co.* . . .). The inevitable consequence of this kind of a technique in Federal employment, as it has been in the private sector, is that classes of persons who are socio-economically or educationally disadvantaged suffer a heavy burden in trying to meet such artificial qualifications. *Id.*

17. See generally Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 950-55 (1981).

18. *Id.* at 947-48, 957-59, 989-98. A major thesis of this article is that the history of Title VII litigation demonstrates the irrationality of many of the employer practices challenges under disparate impact doctrine.

19. The Supreme Court has established burdens of proof doctrine which makes an intentional discrimination case extremely difficult for plaintiffs to prove. See *Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (holding that plaintiff retains burden of proof as to ultimate issue of intent, and that defend-

barriers to black advancement are caused by practices that would never be perceived or characterized by courts as intentional discrimination. Often the problem is that employers simply prefer to use systems that they have traditionally used. Most of these systems—designed by a white male workworld—suit the needs of and serve to benefit white male employees and applicants at the expense of blacks. Most employers do not continue to use such systems because they harbor feelings of invidious discrimination in their hearts. But many, if not most, will not change their ways unless compelled to. Disparate impact doctrine compels them to at least consider the necessity of continuing to use racially exclusionary systems.

There have been threats from the early days of this Administration that efforts would be made to eliminate the disparate impact doctrine. Recently the Chairman of the E.E.O.C. has stepped up the attack, arguing that disparate impact doctrine constitutes a form of reverse discrimination, and that Title VII should be read to prohibit *only* intentional forms of discrimination. He has accordingly called, for example, for revision of the Uniform Guidelines on Employee Selection Procedures²⁰—guidelines that currently endorse disparate impact doctrine, and give guidance to the courts in applying it to concrete situations. The assault on affirmative action signals that more can be expected along these lines.

In any event, this assault, if successful, will necessarily eliminate the *Griggs* doctrine as we know it today. This is because the *Griggs* doctrine requires that employers act in a race-conscious, group-oriented manner. They must, first, keep careful track of the racial impact of their employment procedures in order to determine if these procedures are arguably in violation of law. They must, second, take action whenever they discover that their procedures have had an adverse impact on a group protected by the doctrine. And finally and most importantly, for the *Griggs* doctrine to make any sense from a social and economic policy viewpoint, employers must be free to take *either* of two different kinds of actions at this point. They must, on the one hand, be free to validate their procedures. And they must be free, in the alternative, simply to eliminate the adverse impact of their procedures. The policy reason that employers must have this choice is that validation will simply not always make any business or economic sense. The legal reason is that if the employer eliminates adverse impact, there is no basis in discrimination law for insisting upon validation.

The *Griggs* doctrine has in fact provided employers with this choice from the beginning, and many have recognized that it has, as a result, provided significant pressure on employers to develop affirmative action programs.²¹ The flip side of this point is that employers *must* be allowed to engage in affirmative action programs so long as the *Griggs* doctrine is to survive. The Supreme Court recognized this reality in the *Weber* case.²² The Court there held that private employers could voluntarily engage in affirmative action programs because the Court recognized that employers had to have this freedom so long as they were subject to *Griggs* liability.²³

ant's only burden is to produce evidence articulating—not proving—a nondiscriminatory explanation for any differential treatment of blacks as compared to whites).

20. 29 at C.F.R. 1607.1 to .18 (1980) (first published at 43 Fed. Reg. 38, 290 (1978).

21. See Bartholet, *supra* n.17, at 954 and n.23, and see authorities there cited.

22. *United Steel Workers v. Weber*, 443 U.S. 193 (1979).

23. See Justice Blackmun's concurring opinion:

In his dissent from the decision of the United States Court of Appeals for the Fifth Circuit, Judge Wisdom pointed out that this case arises from a practical problem in the administration of Title VII. The broad prohibition against discrimination places the employer and the union on what he accurately described as a "high tightrope without a net beneath them." 563 F.2d 230, 16 FEP Cases 1, 12. If Title VII is read literally, on the one hand they face liability for past

In *Weber* the court approved a broad affirmative action program designed to achieve goals beyond those that might be seen as remedying the employer's "arguable violation" of law, as the concurring opinion points out.²⁴ But this kind of broad affirmative action response must be permitted if employers are not to be caught in some no man's land between the risk of suits by blacks on the one hand and whites on the other. Decisions as to the exact parameters of the violation and the injured group rest on too many hard-to-calculate factors in today's world of complex Title VII litigation. We cannot have a doctrine that tells an employer that it can avoid a *Griggs* suit by correcting for the arguable violation, but that it must limit its affirmative action program so that it goes no further than this remedial principal would allow. Moreover, employers would be understandably reluctant to justify any affirmative action plan on an arguable violation rationale, for fear of subjecting themselves to backpay liability to the class whose rights were arguably violated.

In any event, the principle espoused by those leading the assault on affirmative action would outlaw all race-conscious, group-oriented employer efforts that go beyond providing remedies to individual identified victims. This principle would not only prevent employers from initiating *Weber*-style affirmative action programs, but also would prohibit a wide variety of other steps employers might otherwise want to take to eliminate adverse impact as a means of avoiding *Griggs* liability.

Theoretically, of course, courts could retain *Griggs*, and simply insist that employers validate all devices that have an adverse impact. But validation, according to strict professional standards, is extremely expensive. If employers are denied the option of eliminating procedures that have an adverse impact, it seems inevitable that the next step would be for the courts to massively reduce the traditional *Griggs* burden on employers to justify their systems with evidence of validation. Thus employers might be required simply to produce legitimate business justifications for their practices. But this soft standard is the very standard that was rejected in *Griggs*, and it would entirely gut the *Griggs* doctrine.²⁵ Alternatively the disparate impact doctrine might be jettisoned altogether.²⁶

The recent *Bushey* case, in which three members of the Supreme Court dissented from a denial of *certiorari*,²⁷ provides a good illustration of the essential linkage between *Griggs* doctrine and affirmative action. In *Bushey* the Second Circuit upheld action taken by the State of New York to eliminate the adverse impact of a test that had been given for the position of "Correction Captain" in the State prison system. The State had been subject to two previous successful suits challenging tests for two other correctional positions. It had no evidence as to the

discrimination against blacks and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

443 U.S. at 209, 216.

24. 443 U.S. at 209.

25. If the *Griggs* standard is watered down so that employers are simply pushed in the direction of providing *some* evidence of job-relatedness, they will be able to justify many racially exclusionary systems, as indeed the Duke Power Company could have justified the devices struck down in *Griggs*. See Bartholet, *supra* at n. 17 at 952-53. Alternatively they are likely to produce "new" tests that have a very similar racial impact as the earlier versions. A look at the "second generation" testing cases reveals a large number of tests designed by the testing experts, that would likely survive a softened *Griggs* standard. While these tests were theoretically designed to deal with some of the problems raised by earlier tests, too often they seem merely to replicate in new form earlier problems. See Bartholet, *supra* n. 17 at 1008-09, 1011-12, 1022-23.

26. *Griggs* and *Weber* have not been the direct targets of the Justice Department's recent assault. But the Department has challenged all forms of public employer-initiated affirmative action. If those are outlawed and *Griggs* undermined in the public arena, it is hard to imagine how *Griggs* and *Weber* can long survive in the private arena. And *Weber* has of course long been the subject of adverse comment by some in this Administration.

27. *Bushey v. New York State Civil Service Commission*, 53 USLW 3477, Jan. 8, 1985, U.S. Sup. Ct.

validity of the captain's test. It did have evidence that blacks were performing comparably with whites in the positions below that of captain. The State decided to adjust the scores of blacks on its captain's test to make them comparable to the white scores, thus eliminating the test's adverse impact. Upon challenge by white candidates, the Second Circuit held that the State was justified in its actions, and that it would make no sense to instead require that the State wait to be sued, or that it try to validate its test. The three dissenting Justices in the Supreme Court hinted that they would agree with a position that sounds frighteningly like the Justice Department's recent briefs attacking public employers' affirmative action programs. These Justices argued that the Court should have taken the case because of the serious constitutional issues raised by this race-conscious, group-oriented action by the State. They suggested that the State's "affirmative action" violated not only the Constitution, but also Title VII. And they suggested that the employer should instead have taken steps to justify the job-relatedness of its procedures, and that it should be as conscious of both white and black interests in considering what action to take. If it is illegal for employers to adjust scores in a *Bushey*-type situation, it may also be illegal for them to scrap the test in favor of an alternative device simply to avoid adverse impact—this also could presumably constitute an illegal "preference" in those Justices' and in various Administration officials' minds.

The *Griggs* doctrine cannot meaningfully survive under these conditions, for the reasons indicated earlier. Validation according to strict professional requirements is simply more than society is likely to be willing to demand with respect to all employer devices that have an adverse impact.

CONCLUSION AND RECOMMENDATIONS

These are the kinds of threats posed. It is important that Congress take action to preserve what has been essential in the fight to eliminate discrimination and to create an integrated workforce. It is important that Congress function as a guardian for existing federal guidelines mandating affirmative action, and, perhaps most important, for the *Griggs* principle. It is obviously important that Congress monitor the actions of the various Federal agencies under its oversight jurisdiction, and take whatever action is possible to prevent them from moving to undermine or eliminate the principles of law endorsed by the Supreme Court in *Griggs* and by Congress in the 1972 Amendments to Title VII—principles which *require* that employers be free to engage in race-conscious, group-oriented action. Administration officials are quite clearly moving in directions that violate the law as it exists today. That law can presumably be used to restrain their actions.

But the Administration—primarily through the Justice Department—is moving simultaneously to change the law through the Supreme Court. It is asking the Court to change the law as we have known it, and in ways that would not only radically limit the meaning of Title VII, but would also prevent Congress in future years from making Title VII and other anti-discrimination legislation meaningful in the future—at least where public entities are concerned, and therefore constitutional issues involved. It is important that Congress consider what kind of action would be effective in informing both the Administration and the Court as to the importance of established principles regarding discrimination and affirmative action, and of the potential for conflict between Congress and the Court.

Finally, it is important that Congress take action—through legislation if necessary—to clarify what the current law is for the benefit of employers and others who may now understandably be at a loss as to how to conduct themselves. Action is needed to clarify that the positions now being taken by various Administration officials are not the law. There is a real danger that while battles rage over agency regulations and over Supreme Court rulings, a large part of the war will be lost out

there where employers are having in the meantime to make decisions. One of the potential tragedies of the current situation is that a movement which has been so slow and costly to build, may have been brought to a grinding halt by the Administration's recent actions. Employers have been subject to the educational pressure of the law, and have gradually developed some sense that discrimination means something more than invidious intent. They have been subject to the *Griggs* liability pressure to get rid of systems with an adverse impact on blacks. They have been subjected to various governmental affirmative action pressures. And in *Weber* they were finally told clearly that it was all right for them to move in the direction of developing affirmative action programs, even in the absence of litigative pressure or government coercion. All these pressures have been in one direction, and employers today have a wide variety of programs in place designed to break down racial barriers in the workplace. They are now being told by the federal government that they will and should be subject to suit both by the government and by white employees for virtually any kind of race-conscious action. It seems to me that it would not take long for this new kind of government pressure to undo much of what has been painstakingly accomplished over the past few decades. Congress should move now to protect the progress that has been made by reaffirming the principles that it and the courts have long espoused in the battle against discrimination in the workplace.